Filed 5/31/16 P. v. Barnes CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONNIE REVELL BARNES, JR., Defendant and Appellant.	E061115 (Super.Ct.No. RIF1314881) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified and remanded for resentencing.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and A. Natasha Cortina, Parag Agrawal and Michael P. Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and an accomplice burst into the home of a couple who were engaged to be married. Defendant was armed with a gun. He made the male victim go upstairs to the bedroom, where the female victim already was. Meanwhile, hearing the commotion downstairs, she called 911. Defendant made the victims get down on the floor and took the only valuable item they had — their wedding rings. The police arrived; this angered defendant, so he hit the male victim in the forehead with the gun butt.

In this appeal, defendant contends:

1. The two counts of aggravated kidnapping were not supported by sufficient evidence of the necessary asportation.

2. Defendant could not be convicted of both aggravated kidnapping and false imprisonment of the same victim.

3. In light of the sentences on the two counts of aggravated kidnapping, the imposition of separate and unstayed sentences on all other counts constituted multiple punishment in violation of Penal Code section 654 (section 654).

4. The trial court erred in pronouncing the sentences on the two aggravated kidnapping counts.

We agree that there was insufficient evidence of asportation to support the aggravated kidnapping counts. Hence, we will reduce these convictions to felony false imprisonment, and we will remand for resentencing. In light of this disposition, we need not address defendant's other contentions. However, we will give the trial court guidance on how to apply section 654 on remand.

I

FACTUAL BACKGROUND

James Gutierrez and Bernadette Macasias lived together in a two-story house in Riverside. They were engaged to be married. They both worked nights, so they slept during the day.

On December 12, 2013, at about 11:00 a.m., they had just gone to bed when the doorbell rang. Gutierrez went downstairs and "cracked the door [open] a little bit." Defendant and his accomplice, Dontay Thomas, pushed it open and came inside.

Defendant pointed a gun at Gutierrez's head. He told him to shut up and threatened to shoot him if he did not. Defendant kept asking who else was in the house. Gutierrez said his fiancée was upstairs. He spoke loudly in the hope that Macasias would hear. Indeed, Macasias heard Gutierrez "screaming." She called 911 and said she thought they were being robbed.

Defendant pushed Gutierrez back from the front door to the foot of the stairs, a distance of about 10 feet. He hit Gutierrez in the back of the head with the gun butt. Then he pushed Gutierrez up the stairs. There were approximately 15 steps. When Macasias heard footsteps coming up the stairs, she closed the bedroom door and locked it. She crouched behind the bed, between the bed and the window.

Defendant asked Gutierrez which room Macasias was in. Gutierrez said she was in the bedroom on the right, which was the master bedroom. The robbers checked the other two bedrooms to see if anyone was there. Thomas then tried to open the door of the

master bedroom, but found that it was locked. Defendant told him to kick it open, and he did so.

Defendant pushed Gutierrez inside. Gutierrez found himself standing at the foot of the bed. Defendant told both victims to get down on the floor. Macasias came out from behind the bed and joined Gutierrez at the foot of the bed, where they both lay down.[1] As Macasias got down, she threw her phone under the bed; it was still connected to 911.

Defendant yelled, "Where the fuck are you guys' phones at?" Thomas found Macasias's phone and told defendant that she had already called the police. Defendant told Thomas to go down to the kitchen and get a knife. Thomas did so; when he got back, he told defendant that the police were there.

Defendant demanded money and jewelry. Gutierrez got a box containing the couple's wedding rings from his desk and handed them to Thomas. He explained that they were the only valuable items in the house.

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[1] According to the People, "[a]ppellant ordered Macasias to '"[c]ome here, come here,"' and Macasias had to move from the side of the bed . . . to the front of the bed . . . ." Neither Macasias nor Gutierrez, however, testified that defendant told Macasias to move. The transcript of the 911 call does indicates that at some point, defendant said, "[*C*]*ome here, come here.* Where's y[']a]ll socks at?" (Italics added.) However, there is no evidence that this was addressed to Macasias or that it meant that she should move anywhere in particular. Both victims testified that, when defendant asked for socks, they were already on the floor at the foot of the bed.

Defendant hit Gutierrez with his gun butt again, this time in the forehead. Gutierrez was "bleeding like crazy everywhere." Defendant said, "Get on the floor. I'm going to shoot." He also said, "[T]he next person to speak, I'll shoot."

Defendant asked where their socks were. Macasias started to get up to get some, but defendant said, "Get down or I'm going to shoot you." Gutierrez then said the socks were in the closet. Thomas got a sock; defendant put it on his hand like a glove.

Defendant told Thomas to cut the cord off a space heater and use it to tie up the victims. Thomas cut the cord and started tying Gutierrez's legs. However, he was nervous; he told defendant that they needed to leave. Thus, both robbers left.

A police officer responding to Macasias's 911 call saw defendant and Thomas jump over a wall. He gave chase and managed to capture defendant. In defendant's pocket, he found a fully loaded and operable revolver.

Other officers found one Millard Brown — who they suspected was the getaway driver — parked nearby.

The next day, a maintenance worker found the ring box, with the rings, in a bush along the route that defendant had taken.

It took eight stitches to close the wound on Gutierrez's forehead. He was left with a scar.

Defendant testified at trial. He was remarkably forthright about his own conduct; however, he resisted "snitching" on anybody else. For example, he claimed there was no getaway driver; rather, he drove to the scene and he was going to drive away. He also suggested that he "forced" Thomas to participate.

Defendant admitted that he was guilty on counts 1 through 7. However, he denied being guilty of kidnapping: "I didn't kidnap nobody." "I just went in there to get money and jewelry. That's it. I didn't go in there to kidnap nobody . . . ." He volunteered that he had committed "about eight" previous robberies, but none of them had involved kidnapping anybody.

Defendant conceded that Gutierrez and Macasias's testimony was "mostly" true. However, as far as he remembered, he hit Gutierrez with the gun butt only once — upstairs in the bedroom, because he was angry that Gutierrez had yelled and thus had enabled Macasias to call the police.

Defendant admitted previous convictions for resisting arrest and for possession of a firearm by a felon. He also admitted that his main source of income was selling drugs — "[a]ny drugs."

II

PROCEDURAL BACKGROUND

After a jury trial, in which defendant represented himself, he was found guilty as charged on nine counts:

Count 1: Residential robbery in concert (Pen. Code, §§ 211, 213, subd. (a)(1)(A)) of Gutierrez, with enhancements for personally using a firearm (Pen. Code, § 12022.53, subd. (b)) and personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 2: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)) on Gutierrez, with an enhancement for personally inflicting great bodily injury.

Count 3: Making a criminal threat (Pen. Code, § 422, subd. (a)) to Gutierrez.

Count 4: Felony false imprisonment (Pen. Code, §§ 236, 237, subd. (a)) of Gutierrez.

Count 5: Residential robbery in concert of Macasias, with an enhancement for personally using a firearm.

Count 6: Assault with a firearm on Macasias.

Count 7: Making a criminal threat to Macasias.

Count 8: Kidnapping of Gutierrez for purposes of robbery. (Pen. Code, § 209, subd. (b).)

Count 9: Kidnapping of Macasias for purposes of robbery.

Before trial, defendant admitted two 1-year prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).)

As a result, defendant was sentenced to a total of 48 years 4 months to life in prison, along with the usual fines, fees, and restrictions.

III

THE SUFFICIENCY OF THE EVIDENCE OF THE ASPORTATION ELEMENT OF KIDNAPPING FOR ROBBERY

Defendant contends that there was insufficient evidence of the asportation element of kidnapping for robbery. Kidnapping for robbery carries a sentence of life with the possibility of parole (Pen. Code, § 209, subd. (b)), so if we accept this contention, defendant's sentence will be shortened substantially.

A. *Applicable Legal Principles.*

"In reviewing a challenge to the sufficiency of the evidence, we 'review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict — i.e., evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 423, italics omitted.)

Both kidnapping for robbery and simple kidnapping have an asportation element: The victim must be "carrie[d] . . . into another country, state, or county, or into another part of the same county . . . ." (Pen. Code, § 207, subd. (a); see also Pen. Code, § 209, subd. (b)(1) [victim must be "kidnap[ped] or carrie[d] away"].)

Above and beyond the asportation required for simple kidnapping, however, kidnapping for robbery also requires "movement of the victim [that] is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (Pen. Code, § 209, subd. (b)(2).)

The rationale behind this heightened asportation requirement is that "some brief movements are necessarily incidental to the crime of armed robbery. Indeed, '[i]t is

difficult to conceive a situation in which the victim of a robbery does not make some movement under the duress occasioned by force or fear.' [Citation.] . . . [S]uch incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of the . . . crime." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1134, fn. omitted.)

"Whether a forced movement of a . . . victim . . . was merely incidental to the [crime], and whether the movement . . . increased the risk of harm to the victim, is difficult to capture in a simple verbal formulation that would apply to all cases." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151.)

"With regard to the first prong, the jury considers the 'scope and nature' of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.]" (*People v. Vines* (2011) 51 Cal.4th 830, 870.) "Measured distance . . . is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient." (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1152.)

With regard to the second prong, the jury "'" . . . consider[s] such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course,

mean that the risk of harm was not increased."' [Citation.]" (*People v. Vines*, *supra*, 51 Cal.4th at p. 870.)[2]

"These two [prongs] are not mutually exclusive but are interrelated. [Citations.]" (*People v. Vines*, *supra*, 51 Cal.4th at p. 870.)

B. *Defendant's Movement of Gutierrez and Macasias*.

Defendant made Gutierrez go from the front door to the stairs (10 feet), then up the stairs (15 steps), and then into the master bedroom (distance unclear, but apparently de minimis). He made Macasias go an even shorter distance — from the side of the bed to the foot of the bed.[3]

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[2] Originally, as a matter of judicial construction of Penal Code section 209, the movement had to "substantially increase the risk of harm" to the victim. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139.) Effective January 1, 1998, the Legislature amended Penal Code section 209 so as to require expressly that the movement must "increase[] the risk of harm to the victim . . . ." (Stats. 1997, ch. 817, § 2, pp. 5519-5520.)

Because the Legislature omitted the word "substantially," it has been suggested that the amendment changed the standard. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 979-982; accord, *People v. Vines*, *supra*, 51 Cal.4th at p. 870, fn. 20 [dictum]; *People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4 [dictum]; see also *People v. Hoard* (2002) 103 Cal.App.4th 599, 615 [dis. & conc. opn. of Ramirez, J.].) The legislative history, however, indicates that no substantive change was intended. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 59 (1997-1998 Reg. Sess.) as amended Mar. 10, 1997, pp. 1, 3-4.)

We believe that, whether the legislature intended to change the standard or not, a movement that *insubstantially* increases the risk of harm does not satisfy the statute. This is an application of the general rule that *de minimis non curat lex*. (See *People v. Caldwell* (1984) 36 Cal.3d 210, 220-221.) It would be absurd to have a defendant's liability to a life term, rather than a maximum of only eight years (Pen. Code, § 208, subd. (a)), turn on whether he or she caused an *insubstantial* increase in the risk of harm.

[3] At first, we questioned whether there was evidence that defendant made Macasias go anywhere at all. As discussed in footnote 1, *ante*, he did not expressly order

[footnote continued on next page]

"'There is no rigid "indoor-outdoor" rule by which moving a victim inside the premises in which he is found is *never* sufficient asportation for kidnapping for robbery while moving a victim from inside to outside (or the reverse) is *always* sufficient. [Citation.] Nonetheless, it has often been held that defendants who have moved their victims within the premises in which they were found did not increase the risk to the victims [citations].' [Citation.]" (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471-1472; accord, *People v. Power* (2008) 159 Cal.App.4th 126, 139 ["Most movements that have been found to be insubstantial or merely incidental to the underlying crime have been within a building [citations], or within the premises of a business [citation]."].)

For example, in *People v. Daniels*, *supra*, 71 Cal.2d 1119, defendant Simmons was convicted on three counts of kidnapping for robbery, as follows. (*Id*. at p. 1122.)

In one instance, Simmons and his codefendant Daniels knocked on the victim's door. When she opened it, Simmons pointed a gun at her and asked if she had any money. She said she did not. The defendants then walked her through the kitchen and into the dining room, a distance of 18 feet. They asked her for money again, but she had none. (*Id*. at p. 1123.)

In the second instance, Simmons knocked on another victim's door. After she opened it, he forced his way in, pulled out a gun, and demanded money. She walked five

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[footnote continued from previous page]
her to go anywhere. However, he did order her to get down. It is fairly inferable that this meant to get down someplace where he could see her, and thus it was effectively an order to move.

or six feet to get her purse, then gave him the money that was in it. (*Id*. at pp. 1123-1124.)

In the third instance, Simons and Daniels rang the victim's doorbell. When she opened the door, Simmons pulled out a gun and forced her back into the room. He "walked her first towards the kitchen and then towards the bedroom to see if anyone was there. He then sat her down on the bed and asked for her money. The distance that the parties had covered was about 30 feet." (*Id*. at p. 1124.)

The Supreme Court held "that the brief movements which defendants Simmons and Daniels compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him — whether it be a residence, as here, or a place of business or other enclosure — his conduct generally will not be deemed to constitute the offense proscribed by section 209." (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140.)

In the wake of *Daniels*, the Supreme Court issued a number of opinions granting recall of the remittitur in cases that it deemed similar.

For example, in *People v. Killean* (1971) 4 Cal.3d 423, our Supreme Court stated: "In the course of robbing a jeweler and his companion in the [jeweler]'s apartment, [defendants] Killean and Leahy caused them to move across the threshold and through various rooms in search of valuables. These movements were merely incidental to the

robbery and did not substantially increase the risk of harm beyond that inherent in the robbery itself. [Citation.]" (*Id*. at p. 424.)

Likewise, in *People v. Morrison* (1971) 4 Cal.3d 442, the Supreme Court stated: "In the course of robbing one person in the confines of a private residence, Morrison caused her to move up and down the stairs and into various rooms. These movements were merely incidental to the robbery and did not substantially increase the risk of harm beyond that inherent in the robbery itself. [Citation.]" (*Id*. at p. 443.)

These Supreme Court cases have never been overruled. Unless they can be distinguished, we must follow them. The People argue that "subsequent decisions by the California Supreme Court clearly state that the important question is the nature and scope of the movement, and not whether a victim was moved within a premises or between premises." This is a false dichotomy. Whether the victim was moved within or between premises is an aspect — and a very significant one — of the nature and scope of the movement. We recognize that there may be instances in which movement of a victim within a structure can be sufficient to support a conviction, but there must be some facts that distinguish that case from *Daniels*, *Killean*, *Morrison*, and *Washington*.

In just such an effort to distinguish this case, the People argue that the movement of the victims increased the risk of harm to them. It is certainly arguable that forcing Gutierrez to leave the front door area and to go upstairs and into a bedroom made it harder for him to call out for help or to flee. However, it would seem that this was equally true of two of the three victims in *Daniels*, who were forced at gunpoint to leave their front doors and to go into an interior room.

The People also rely on *People v. Simmons*, *supra*, 233 Cal.App.4th 1458. There, in two separate robberies, the defendant forced the victim or victims to move from outside, in front of a house, to the inside of the house. (*Id*. at pp. 1469-1472.) The court specifically distinguished *Daniels*, noting that there: "The victims were moved within their homes [citation], characterized by the court as 'brief movements' that were 'solely to facilitate' the defendants' crimes. [Citation.] The court concluded that 'when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him – whether it be a residence, as here, or a place of business or other enclosure – his conduct generally will not be deemed to constitute' aggravated kidnapping. [Citation.] Here, by contrast, the victims were moved from outdoors to inside under circumstances that increased harm and their risk of additional harm." (*Simmons*, *supra*, at pp. 1472-1473.) We cannot similarly distinguish *Daniels*.

Finally, the People cite *People v. Vines*, *supra*, 51 Cal.4th 830 and suggest that it modified or superseded *Daniels*. In *Vines*, during the robbery of a McDonald's, the defendant made one employee (Zaharko) open a safe; meanwhile, the three other employees went from the front of the store to the back of the store. The defendant then made all four employees go downstairs to the basement and into a walk-in freezer. Finally, he closed the freezer and locked it. (*Id*. at pp. 841-842, 870.) The employees traveled an estimated total of 80 or 90 feet. (*Id*. at p. 870.) Zaharko was injured when he and the other employees used an ax to chop their way out of the freezer. (*Id*. at p. 842.) As a result, the defendant was convicted on four counts of kidnapping for robbery. (*Id*. at p. 839.)

The court held that there was sufficient evidence of the necessary asportation: "As in *Daniels*, defendant's forcible movement of the victims was limited to movement inside the premises . . . [citation], but unlike in *Daniels*, the movement here took Zaharko — and ultimately the other victims — from the front of the store, down a hidden[4] stairway, and into a locked freezer. Under these circumstances, we cannot say the 'scope and nature' of this movement was 'merely incidental' to the commission of the robbery. Additionally, the movement subjected the victims to a substantially increased risk of harm because of the low temperature in the freezer, the decreased likelihood of detection, and the danger inherent in the victims' foreseeable attempts to escape such an environment." (*People v. Vines*, *supra*, 51 Cal.4th at pp. 870-871, italics omitted.)

Thus, *Vines* accepted and applied *Daniels*; it merely distinguished it. Again, however, we cannot distinguish *Daniels* so easily. The victims here traveled a much shorter distance than the victims in *Vines*. Moreover, they were moved into or around their own bedroom, not into a hazardous environment like the freezer in *Vines*, where the victims faced the Scylla of hypothermia and the Charybdis of injury from using an ax to escape. Any increased danger that the victims here faced came from being shut up with two robbers armed with a gun, albeit in a bedroom and not at a door or window. In other words, it was not much greater than the danger inherent in a "standstill" robbery.

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4 The court emphasized the fact that the stairway would not have been visible to customers waiting at the counter to order food. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 841, 870, fn. 21.) It is not clear why this was significant, as the McDonald's was closed at the time. (*Id*. at p. 841.)

Accordingly, we conclude that there was insufficient evidence to support the convictions of kidnapping for robbery.

C. *The Appropriate Appellate Remedy*.

"[A]n appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense.' [Citations.]" (*People v. Bailey* (2012) 54 Cal.4th 740, 748, fn. omitted.) "Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]' [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 155.)

"[S]imple kidnapping is a necessarily included offense of kidnapping to commit robbery . . . . [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 518, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) Moreover, it has been held that "[t]he crime of kidnaping necessarily includes the crime of false imprisonment effected by violence. [Citations.]" (*People v. Gibbs* (1970) 12 Cal.App.3d 526, 547; accord, *People v. Daniels* (1993) 18 Cal.App.4th 1046, 1053.)

"Both simple kidnapping and aggravated kidnapping (except kidnapping for ransom or extortion) have an asportation element. [Citation.] But the standard for proving the asportation element of simple kidnapping is not the same as that for aggravated kidnapping." (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.) "[F]or simple kidnapping asportation[,] the movement must be 'substantial in character'

[citation] . . . ." (*People v. Martinez* (1999) 20 Cal.4th 225, 235.) "[T]he increase of harm and other contextual factors may be considered in determining whether asportation for simple kidnapping has been proved. [Citation.]" (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1436.) However, "asportation for simple kidnapping does not *require* a finding of an increase in harm to the victim or other contextual factors. [Citation.]" (*Id*. at p. 1435, italics added.)

The People have asked us, if we find insufficient evidence to support the conviction for aggravated kidnapping, to reduce it to felony false imprisonment. Significantly, they do not ask us to reduce it to simple kidnapping. We deem this to be a concession that, at least on this record, if there is insufficient evidence of the asportation element of aggravated kidnapping, then there is likewise insufficient evidence to support the asportation element of simple kidnapping. We therefore do not discuss the issue further.

Accordingly, we will modify defendant's convictions on counts 8 and 9 by reducing them from kidnapping for robbery to felony false imprisonment. We must remand for resentencing.

IV

DUAL CONVICTION OF BOTH KIDNAPPING AND FALSE IMPRISONMENT

Defendant contends that count 4 (felony false imprisonment of Gutierrez) is a lesser included offense of count 8 (kidnapping of Gutierrez for purposes of robbery), and therefore he cannot be convicted of both. (See *People v. Pearson* (1986) 42 Cal.3d 351, 355.) The People concede the point.

We are reducing count 8 to felony false imprisonment. (See part III, *ante*.) Hence, count 4 is now wholly duplicative of count 8. Accordingly, we will strike the conviction on count 4.

V

PENAL CODE SECTION 654

Defendant contends that the imposition of separate and unstayed sentences on counts 1 through 7 constituted multiple punishment in violation of Penal Code section 654.

Although we are remanding for resentencing, we address this contention for the guidance of the trial court.

A. *Applicable Legal Principles.*

Penal Code section 654, subdivision (a), as relevant here, states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"'"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 885.)

"""'A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' [Citation.]" [Citation.]' [Citations.]" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Because we are reversing and reducing defendant's convictions on counts 8 and 9, we must reframe his contention slightly. Now, the counts that provide for the longest potential term of imprisonment are counts 1 (residential robbery in concert of Gutierrez) and 5 (residential robbery in concert of Macasias).[5] It is clear that, under the multiple victim exception to Penal Code section 654 (see generally *People v. Oates* (2004) 32 Cal.4th 1048, 1063-1069), defendant can be punished separately on each of these two counts. The issue then becomes whether he can also be punished separately on counts 2, 3, and 8 (as to Gutierrez) and on counts 6, 7, and 9 (as to Macasias).

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[5] Specifically, the potential penalties are (see *People v. Kramer* (2002) 29 Cal.4th 720, 723-724 [in determining which count provides for the longest potential term of imprisonment for purposes of section 654, enhancements must be included]):

Counts 1 and 5 (residential robbery in concert): Three, six, or nine years (Pen. Code, § 213, subd. (a)(1)(A)), plus ten years (Pen. Code, § 12022.53, subd. (b)), plus three years (Pen. Code, § 12022.7, subd. (a)).

Counts 2 and 6 (assault with a firearm): Two, three, or four years (Pen. Code, § 245, subd. (a)(2)), plus three years (Pen. Code, § 12022.7, subd. (a)).

Counts 3 and 7 (making a criminal threat): Sixteen months, two years, or three years. (Pen. Code, §§ 18, subd. (a), 422, subd. (a).)

Counts 8 and 9 (felony false imprisonment): Sixteen months, two years, or three years. (Pen. Code, §§ 237, subd. (a), 1170, subd. (h).)

B. *Counts 2 and 6: Assault with a Firearm*.

When an assault is the means of perpetrating a robbery, the assault and the robbery cannot be punished separately. (*People v. Ridley* (1965) 63 Cal.2d 671, 678; *People v. Logan* (1953) 41 Cal.2d 279, 290.) By contrast, when the assault is "gratuitous" (see *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 [attempted murder and robbery]) or an "afterthought" (*People v. Williams* (1966) 244 Cal.App.2d 658, 662), it can be punished separately.

The People concede that the assault on Macasias was part and parcel of the robbery of Macasias and thus cannot be separately punished. They argue, however, that the robbery of Gutierrez was essentially completed when defendant gratuitously assaulted Gutierrez by hitting him in the head with the gun butt. Defendant's response is that, in the trial court, the prosecutor asserted that the assault consisted of pointing the gun at Gutierrez. (See *People v. Raviart* (2001) 93 Cal.App.4th 258, 263 ["Assault with a deadly weapon can be committed by pointing a gun at another person [citation] . . . .].) Defendant also suggests that, having taken this position below, the prosecution is bound by it now.

Actually, the evidence showed that pointing the gun at Gutierrez and hitting him with it were both part of one single continuous assault. In *People v. Oppenheimer* (1909) 156 Cal. 733, the defendant was charged with assault with a deadly weapon. The evidence showed that first, he hit the victim with a sash weight, then, he cut him with a knife. (*Id.* at pp. 736-737.) On appeal, he argued the prosecution had to elect between prosecuting him for assault with the weight and assault with the knife. The Supreme

Court rejected this argument: "We think it is manifest that there was but a single assault shown by this evidence. . . . If one unlawfully assails another with his two hands, first striking at him with one hand and immediately thereafter with the other, no one would say that there were two offenses. The offense would be the one unlawful attempt, coupled with a present ability, to commit a violent injury upon the other's person, and each effort made in what constituted only the same attempt to accomplish this result would constitute only a single element of that attempt. . . . The evidence . . . in this case tended to show one continuous transaction, one assault in which two weapons were used." (*Id*. at p. 740.)

The prosecution's position below was consistent with this. Admittedly, in closing argument, the prosecutor did state that merely pointing the gun could constitute an assault. However, the prosecution had also alleged a great bodily injury enhancement in connection with the assault count. Plainly this related to hitting Gutierrez in the forehead with the gun butt, and the prosecutor so argued.

We conclude that the assault constituted the force and fear by which defendant accomplished the robbery, even though it continued after the robbery was essentially complete. Hence, the trial court should have stayed the sentence on the assault.

C. *Counts 3 and 7: Making a Criminal Threat*.

The criminal threats consisted of defendant's various threats to shoot Gutierrez and Macasias. The People argue that these threats were made to avoid detection, rather than to accomplish the robberies.

In *People v. Nichols* (1994) 29 Cal.App.4th 1651, the defendant "kidnapped a truck driver and hijacked his tractor-trailer . . . . During the two-hour kidnapping [the defendant] looked at the victim's driver's license and said 'If you open your mouth we are going to kill you. I know where you live.'" (*Id.* at p. 1654.) The appellate court held that the defendant could be separately punished for both kidnapping for robbery and attempting to dissuade a witness by threat of violence (see *ibid.*): "We find substantial evidence that appellant had two separate objectives: (1) to hijack the truck by kidnapping and robbing the victim and (2) to avoid detection and conviction by dissuading and intimidating the victim. [¶] The first objective was accomplished in two hours. The second was ongoing. It was initially successful when the victim, fearing for his life, falsely told the police he had been blindfolded and could not identify any of the kidnappers. [¶] The means of achieving each objective was also different. A shotgun pressed against the victim's stomach achieved the first. Looking at the victim's driver's license, reading aloud his address, and threatening future harm achieved the second." (*Id.* at pp. 1657-1658.)

Here, by contrast, the robbery was still in progress when defendant made the threats. He threatened the victims to make them comply with his immediate demands — to get down and to shut up — not to prevent them from reporting the crime in the future. Indeed, defendant testified frankly that scaring the victims was an integral part of the robberies. "[T]hat's what you need to happen so you can get the stuff . . . [.]" "I just want them to be so scared to where I tell them give me their stuff, and I can leave without doing anything to them." He was "yelling" and "saying curse words" "[b]ecause it's

robbery." Thus, along with the assaults with a firearm, the threats constituted the force or fear that defendant used to accomplish the robberies.

We therefore conclude that the trial court erred by failing to stay the sentences for making a criminal threat.

D. *Counts 8 and 9: Felony False Imprisonment.*

In part III.C, *ante*, we reduced defendant's conviction on counts 8 and 9 from kidnapping for robbery to felony false imprisonment. Our only reason for doing this, however, was that there was insufficient evidence to meet the asportation standard for kidnapping. We cannot ignore the jury's implied finding that the restraint of the victims' movements was committed for the purpose of robbery. Moreover, it seems undeniable that, when defendant restrained the victims' movements, he did so for the purpose of successfully accomplishing the robberies.

Thus, the sentences on counts 8 and 9 must also be stayed.

VI

THE SENTENCES ON COUNTS 8 AND 9

Defendant contends that the trial court erred by sentencing him on counts 8 and 9 (kidnapping for robbery) to seven years to life in prison; he claims that it should have sentenced him to life in prison with the possibility of parole. The People concede the error. Again, however (see part IV, *ante*), because we are reducing defendant's convictions on counts 8 and 9, the error is moot.

VII

DISPOSITION

Defendant's conviction on count 4 is stricken. His convictions on counts 8 and 9 (kidnapping for robbery) are reduced to felony false imprisonment. On remand, the trial court shall resentence defendant in a manner not inconsistent with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.